91-1240

Supreme Court, U.S.
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No. 91-____

IN THE
UNITED STATES SUPREME COURT
OCTOBER TERM 1991

DANIEL ENGELKE,

Petitioner,

v.

GREGORY A. SCHER,

Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

I.

IS THE EIGHTH AMENDMENT VIOLATED IF A PRISONER, BY HIS OWN ADMISSION, SUFFERS NO PHYSICAL ABUSE, PAIN OR INJURY AS A RESULT OF AN OFFICER'S CONDUCT -- CONDUCT THAT INVOLVES ONLY CELL SEARCHES AND NO ACTUAL CONTACT WITH THE PRISONER?

II.

IS A PUBLIC OFFICIAL ENTITLED TO THE PROTECTION OF QUALIFIED IMMUNITY WHEN, AS THE EIGHTH CIRCUIT CONCEDED, NO PREVIOUS COURT DECISION HAD HELD THE CONDUCT AT ISSUE TO CONSTITUTE AN EIGHTH AMENDMENT VIOLATION?

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Constitutional Provision:

United States Constitution
Eighth Amendment .....*passim*

OPINIONS BELOW

The panel opinion of the United States Court of Appeals is reported at 943 F.2d 921. The opinion is reprinted in the appendix to this petition at A2-A17. The opinion of the district court is unreported but is reprinted in the appendix at A18-A27.

JURISDICTIONAL STATEMENT

Daniel Engelke petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Eighth Circuit in this Case. The jurisdiction of the district court was invoked pursuant to 28 U.S.C. § 1331 and § 1343(3) and (4). The opinion of the court of appeals was entered on September 11, 1991. A petition for rehearing or rehearing en banc was denied on November 1, 1991 by an **equally divided** court (A1). The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

CONSTITUTIONAL PROVISION

The relevant constitutional provision involved in this case is the Eighth Amendment which provides:

> Excessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishment inflicted.

STATEMENT OF THE CASE

This petition arises from a decision of the Eighth Circuit Court of Appeals affirming an order of the District Court for the Eastern District of Missouri. This Order denied petitioner's motion for judgment notwithstanding the verdict, or alternative motion for new trial.

This litigation involved respondent, a Missouri prisoner, and two correctional

officers.[1] While the allegations of respondent were vigorously disputed at trial, for purposes of appeal and this petition, they are construed in respondent's favor. Respondent alleged that petitioner searched respondent's cell ten times during a three week period of time and left the cell in a state of "disarray" three times. Respondent explicitly admitted that there was no physical abuse of him by petitioner. The jury awarded $0 in actual damages (changed *sua sponte* by the trial court to $1) and $1000 in punitive damages.

The case was presented to the jury under the cruel and unusual punishment clause of the Eighth Amendment to the United States Constitution. The district court affirmed

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[1]The other correctional officer did not appeal the jury verdict and is not a party to this petition.

the jury award even though respondent testified that he was not physically abused by petitioner. There was no physical contact between petitioner and respondent. The respondent did not present any evidence of mental distress and did not claim to suffer a significant injury as a result of the cell searches.

The district court found that the Eighth Amendment does protect prisoners from searches conducted only for calculated harassment. The district court cited ***Hudson v. Palmer***, 468 U.S. 517, 530 (1984), a case involving the Fourth Amendment. The district court further denied petitioner qualified immunity finding that ***Hudson v. Palmer*** clearly established a constitutional right. The Eighth Circuit affirmed finding that the Eighth Amendment can be violated even if there was no physical abuse, injury or pain. The Eighth Circuit also denied petitioner qualified immunity.

The district court's order was issued on July 31, 1990. The opinion of the Eighth Circuit was issued on September 11, 1991. Petitioner filed a timely petition for rehearing or rehearing en banc, which was denied by an **equally divided** court on November 1, 1991.

REASONS FOR GRANTING THE WRIT

The Eighth Circuit's Holding that the Eighth Amendment Can be Violated without Physical Abuse, Pain or Injury is Contrary to Decisions of this Court and an Unprecedented Expansion of the Eighth Amendment.

The primary issue in this case is whether petitioner's alleged searches of respondent's cell which involved no abuse, no injury, no pain, and no contact, can constitute cruel and unusual punishment under the Eighth Amendment. This Court has held cell searches do not violate the Fourth

Amendment. No court has ever found cell searches to violate the Eighth Amendment. Further, this Court and the Eighth Circuit have consistently held that the infliction of pain is an essential element of an Eighth Amendment violation. There was no pain inflicted here. The alleged conduct could not have constituted cruel and unusual punishment.[2]

I. Numerous Supreme Court and Appellate Court Cases Declare that Pain is a Prerequisite to an Eighth Amendment Claim.

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[2]The Eighth Circuit concluded that the constitution was violated because there was a "retaliatory" aspect to the cell searches (A11). See also A15 ("retaliation for the exercise of a constitutional right"). In this case, however, no first amendment retaliation claim was asserted or presented to the jury. In addition, no Fourth Amendment claim was asserted. Only the Eighth Amendment claim was asserted and presented to the jury.

This Court has repeatedly held that an Eighth Amendment claim requires some infliction of pain: "After incarceration, only the 'unnecessary and wanton infliction of pain' . . . constitutes cruel and unusual punishment forbidden by the Eighth Amendment." ***Whitley v. Albers***, 475 U.S. 312, 319 (1986), *quoting* ***Ingraham v. Wright***, 430 U.S. 651, 671 (1977) and ***Estelle v. Gamble***, 429 U.S. 97, 103 (1976).

Recently, this Court reiterated that "only the 'unnecessary and wanton infliction of pain' implicates the Eighth Amendment". ***Wilson v. Seiter***, __ U.S. __, 111 S.Ct. 2321, 2323 (1991), *quoting* ***Estelle v. Gamble***, *supra*. Accord, ***Rhodes v. Chapman***, 452 U.S. 337, 346 (1981) (the Eighth Amendment prohibits punishments which "involve the unnecessary and wanton infliction of pain").

The Eighth Circuit has previously held that an action for "cruel and unusual punishment" cannot be established "without a

showing of some measure of pain of some type." ***Cowans v. Wyrick***, 862 F.2d 697, 699 (8th Cir. 1988). The Eighth Circuit has previously rejected a prisoner's Eighth Amendment claim for failure to "fulfill the second aspect of the ***Cowans*** test by failing to present evidence of pain." ***Rodgers v. Thomas***, 879 F.2d 380, 385 (8th Cir. 1989).

In the case at bar, the respondent expressly admitted, and the Eighth Circuit found, there was no physical pain (A4-A28), and there was no evidence of mental pain. While respondent's cell was allegedly searched ten times in nineteen days, the cell was allegedly left in disarray only on three occasions (A4). Thus, under this record, on seven occasions when respondent's cell was allegedly searched, it was not searched in a manner that caused the respondent harm or inconvenience.

II. Cell Searches that Involve no Pain or Contact with the Inmate cannot Constitute Cruel and Unusual Punishment.

The Eighth Circuit's holding expands the scope of the Eighth Amendment in an unprecedented manner. Previously, the Eighth Amendment has been held to involve situations where there has been actual physical contact involving the state actor and the prisoner resulting in physical abuse, pain or injury. The Eighth Circuit's holding allows an Eighth Amendment claim when there is no physical contact between the officer and the prisoner, where the inmate suffers no physical abuse, pain or injury and in situations where the inmate is not even present when the officer acts. In effect, the Eighth Circuit has expanded the scope of the Eighth Amendment to include virtually every aspect of the relationship between correctional officers and prisoners.

This Court has stated that "[n]ot every governmental action affecting the interests or well-being of a prisoner is subject to Eighth Amendment scrutiny . . . ." ***Whitley v. Albers***, 475 U.S. at 319. The fact that conditions under which an inmate lives are restrictive and even harsh is not actionable; such conditions are "part of the penalty that criminal offenders pay for their offenses against society." ***Rhodes v. Chapman***, 452 U.S. at 347. This Court has warned that courts must proceed cautiously in making an Eighth Amendment judgment because "unless we reverse it, '[a] decision that a given punishment is impermissible under the Eighth Amendment cannot be reversed short of a constitutional amendment.'" *Id.* at 351.

This Court has previously rejected reasoning that would make the constitutional amendments "a font of tort law to be superimposed upon whatever systems may already be administered by the States." ***Paul***

v. Davis, 424 U.S. 693, 701 (1976). The Eighth Circuit's holding in this case expands the scope of the Eighth Amendment to regulate virtually every aspect of the relationship between correctional officers and prisoners. The Eighth Amendment was never intended to be applied in such a manner. Rather, the Eighth Amendment's cruel and unusual punishment clause was intended to protect prisoners from the willful and wanton infliction of pain. Conflicts between correctional officers and inmates that do not result in physical abuse, pain or injury should not be subject to scrutiny under the Eighth Amendment.

III. An Eighth Amendment Claim Requires Significant or Substantial Injury or Pain.

This Court is now considering a case involving the issue of whether the Eighth Amendment is violated if an inmate's physical injuries were not "significant." *Hudson v. McMillian*, 929 F.2d 1014, cert. granted, __

U.S. __, 111 S.Ct. 1579 (1991). This Court heard oral arguments in this case on November 13, 1991. As of this date, the court has not rendered a decision.

The ***Hudson v. McMillian*** case arose from the Fifth Circuit which requires a significant injury for an Eighth Amendment violation. *See e.g.*, ***Johnson v. Morel***, 876 F.2d 477, 480 (5th Cir. 1989) (en banc) ("use of excessive force does not give constitutional import . . . to minor harms"); ***Huguet v. Barnett***, 900 F.2d 838, 840 (5th Cir. 1990) ("significant injury" required). For example, in ***Hudson v. McMillian***, this Court is considering whether minor bruises and swelling which required no medical attention constitute a "significant injury" to satisfy the Eighth Amendment. In the case at bar, however, there is no evidence of any injury whatsoever.

The record shows that respondent suffered no pain at all, physical or mental.

Not only did respondent specifically disavow any physical pain (A4-A28), he failed to testify that the alleged cell searches caused him trauma, anguish, misery, mental pain, mental distress, or even bruised feelings. Injury cannot be presumed. ***Cowans v. Wyrick***, 862 F.2d at 700.

The Eighth Circuit's opinion goes beyond any precedent. There are simply no cases in which anything short of physical pain has been sufficient to sustain a verdict for a prisoner in an Eighth Amendment claim. Courts have repeatedly held conduct involving more intrusiveness and a greater infliction of pain than that found here was insufficient as a matter of law to sustain an Eighth Amendment claim. *See, e.g.*, ***Rodgers v. Thomas***, *supra*, 879 F.2d 384 (a prisoner stripped to his underwear, placed in an isolation cell for five days with nothing but mattress on the floor, a sheet and a blanket, leaving prisoner to catch the flu, all for no

valid penological purpose; summary judgment affirmed because injury was "minimal"); ***Cowans v. Wyrick***, *supra*, 862 F.2d 697 (door slammed on prisoner's hands; remanded because jury was not instructed it must find pain); ***Wyatt v. Delaney***, 818 F.2d 21 (8th Cir. 1987) (officer intentionally shoved prisoner for no reason, allegedly causing humiliation; judgment for officer affirmed because injury was only "bruised feelings" and thus de minimis); ***Black Spotted Horse v. Else***, 767 F.2d 516 (8th Cir. 1985) (summary judgment affirmed where prisoner alleged officer poked him, bruised his leg, and spoke to him in a belligerent tone; insufficient to constitute cruel and unusual punishment); ***Roy v. Jenkins***, No. 86-C-5738 (N.D. Ill. July 11, 1988) (1988 WESTLAW 74709, Allfeds Library); (summary judgment granted where officers covered prisoner's mattress with feces in absence of proof prisoner was "seriously affected"); ***Sampley v. Ruettgers***, 704 F.2d

491 (10th Cir. 1983) (pushing prisoner and spitting on hair clippers to be used on prisoner insufficient; pain is an element of Eighth Amendment Claim and must constitute "more than momentary discomfort; the attack must have resulted in either severe pain or a lasting injury"); ***Pressly v. Gregory***, 831 F.2d 514, 518 (4th Cir. 1987) (constitutional violation requires "verifiable injury").

These cases are just a sample of the numerous situations where prisoners have actually suffered physical pain or injury without the Eighth Amendment being violated. In the case at bar, the prisoner -- by his own admission -- did not suffer any physical abuse, pain or injury. There was no evidence of mental distress or anguish. While the prisoner may have been inconvenienced by the alleged cell searches, the Eighth Amendment is simply not implicated where there is no significant pain or injury.

Should this Court affirm the Fifth Circuit's holding in ***Hudson v. McMillian***, *supra*, then petitioner suggests it would be appropriate to grant this petition for writ of certiorari and either reverse outright the Eighth Circuit's decision or remand this case to the Eighth Circuit for reconsideration of its holding in light of the affirmance in ***Hudson v. McMillian***.

IV. The Eighth Circuit Misinterprets this Court's holding in Hudson v. Palmer.

The Eighth Circuit sustained the verdict based on its reading of *dicta* in ***Hudson v. Palmer***, 468 U.S. 517, 530. In doing so, the Eighth Circuit misapplied well-established qualified immunity principles set forth by this Court. While admitting that "no court has held that cell searches constitute an Eighth Amendment violation" (A16), the Eighth Circuit nonetheless considered this

"irrelevant" on the qualified immunity issue (A16).

In ***Hudson v. Palmer***, this Court held that cell searches did not violate the Fourth Amendment. In the case at bar no Fourth Amendment claim was asserted or presented to the jury. The Court stated that the fact that the Fourth Amendment was not violated did not necessarily mean that the inmate was "without a remedy for calculated harassment unrelated to prison needs." *Id.* at 530. The Eighth Circuit interpreted this to mean that the Eighth Amendment prohibits all instances of calculated harassment unrelated to prison needs, without regard to the sufficiently serious injury component or the physical pain element of the Eighth Amendment.

The *dicta* in ***Hudson v. Palmer*** should not be read to override prior Eighth Amendment cases that required injury or pain, particularly in light of the many subsequent cases from this Court and elsewhere requiring

a sufficiently serious deprivation or injury. Indeed, ***Hudson v. Palmer*** itself involved an allegation that a cell search was conducted solely for purposes of harassment, and summary judgment was granted and sustained on the Eighth Amendment claim. ***Palmer v. Hudson***, 697 F.2d 1220, 1221, n. 1 (4th Cir. 1983).

The Eighth Circuit's holding misapplies well-established qualified immunity principles. While this Court has stated that the action in question need not have been previously held unlawful, it has said that "in the light of pre-existing law the unlawfulness must be apparent." ***Anderson v. Creighton***, 483 U.S. 635, 640 (1987). Public officials, however, are certainly entitled to rely on previous case law in determining whether their conduct would violate a clearly established constitutional right. Contrary to the Eighth Circuit's reasoning, it is of major significance to an appropriate

qualified immunity analysis that no court case has ever found a cell search violative of the Eighth Amendment.

The Eighth Circuit relies on the *dicta* in ***Hudson v. Palmer*** to find that the prisoner had a clearly established constitutional right. The constitutional right the Eighth Circuit found clearly established was the "law making retaliation for the exercise of a constitutional right actionable under § 1983 . . ." (A15). Retaliation, however, is not an Eighth Amendment violation, but, rather, a First Amendment concept. Respondent did not assert a First Amendment claim in this case.

This Court has recently noted that the threshold inquiry in determining qualified immunity is whether the respondent has established "the violation of any constitutional right at all." ***Siegert v. Gilley***, __ U.S. __, 111 S.Ct. 1789, 1794 (1991). The discussion above demonstrates that respondent has failed to establish an

Eighth Amendment violation at all. Under no stretch of the imagination, however, can it be held that respondent has demonstrated a clearly established constitutional right. The fact that this Court is considering an Eighth Amendment case where far more egregious conduct, resulting in far more serious injury and pain, did not violate the Eighth Amendment, is persuasive argument that the law was not clearly established in this area.

V. The Eighth Circuit Holding Sets a Dangerous Precedent for Public Policy Reasons.

The Eighth Circuit opinion establishes such a low threshold for conduct to constitute cruel and unusual punishment that it is contrary to principles previously set forth by this Court. Furthermore, the Eighth Circuit opinion will have a severe chilling effect on corrections officers. These officers, searching prisoner cells by

necessity, will realize that there is a risk of having a judgment entered against them when a prisoner claims that his cell was searched too often and not left in a neat condition each time.

Cell searches are an important component for establishing and maintaining internal prison security. In maximum security institutions or units, daily cell searches are not uncommon to control contraband and weapons and deter security problems. The Eighth Circuit's holding could have the effect of inhibiting correctional officers from performing searches necessary to the safety and security of the institution. The Eighth Circuit holding could result in thousands of frivolous civil rights actions challenging repeated cell searches or cell searches that were less than tidy. This Court should make clear that the phrase "cruel and unusual punishment" retains some semblance of its ordinary meaning.

CONCLUSION

For the reasons stated, petitioner respectfully requests this Court to grant a writ of certiorari.

Respectfully submitted,

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UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

No. 90-2563EM

Gregory A. Scher,	)	
	)	
Appellee,	)	
	)	
v.	)	Order Denying
	)	Petition for
Daniel Engelke,	)	Rehearing with
	)	Suggestion for
Appellant.	)	Rehearing En Banc

Appellant's petition for rehearing with suggestion for rehearing en banc has been considered by the court and is denied by reason of the lack of a majority of the active judges voting to rehear the case en banc. Judges J. Gibson, Fagg, Bowman, Magill and Beam would grant.

Rehearing by the panel is also denied.

November 1, 1991

Order Entered at the Direction of the Court:
Clerk, U.S. Court of Appeals, Eighth Circuit

Gregory A. Scher, Appellee,

v.

Daniel Engelke, Appellant.

No. 90-2563

United States Court of Appeals,
Eighth Circuit.

Submitted April 10, 1991.

Decided Sept. 11, 1991.

Rehearing and Rehearing En Banc
Denied Nov. 1, 1991

Before LAY, Chief Judge, and PECK* and ROSS, Senior Circuit Judges.

JOHN W. PECK, Senior Circuit Judge, Daniel Engelke appeals from the district court's[1] denial of his motion for judgment

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*The Honorable John W. Peck, Senior United States Circuit Judge for the Sixth Circuit Court of Appeals, sitting by designation.

[1]The Honorable Stephen N. Limbaugh, District Judge, United States Court for the Eastern District of Missouri.

notwithstanding the jury verdict in this 42 U.S.C. § 1983 action. For the reasons stated below, we affirm.

I. FACTS

During the time period relevant to this suit, Appellee Gregory Scher was an inmate at Missouri Eastern Correctional Center (MECC). Appellant Daniel Engelke was a prison guard at MECC. James Smith, another MECC guard and defendant in this case, approached Scher requesting a source for contraband weapons. Scher reported this to prison officials. After repeated demands from Smith, Scher gave Smith a note with the name of a purported weapons source. The note was found in Smith's hat as he left MECC. Prison policy prohibits the removal of anything, including a note, from the premises. Following this infraction, Smith was transferred to tower duty. Smith again violated prison policy by making phone calls from the tower into the

prison allegedly threatening Scher. Following this incident, Smith was placed on administrative leave and he subsequently resigned.

Following Smith's resignation, Scher's cell was searched repeatedly. Appellant Engelke searched Scher's cell ten times in nineteen days. On three occasions the cell was left in disarray. Several items such as pens, tape, and a washcloth were confiscated during the searches. On one occasion Engelke issued a conduct violation against Scher for having a television set in his cell that did not appear on his property list. The television set belonged to another inmate who had loaned it to Scher's roommate. However, Scher's roommate was not issued a conduct violation. Scher was not physically abused during any of these searches.

In May 1986, Scher commenced the present action by filing a pro se complaint naming numerous prison personnel. Most of the

defendants were dismissed prior to the completion of the trial. However, Scher's claims against Engelke were submitted to the jury on eighth amendment grounds. The jury found against Engelke and Smith and awarded Scher $1000 punitive damages from each. The jury did not award any actual damages, but the district court awarded $1 nominal damages *sua sponte*. Engelke made a motion for judgment notwithstanding the verdict which the district court denied. Engelke appealed to this court.

II. ANALYSIS

A. *Denial of JNOV motion*

A directed verdict or JNOV may be entered "only where all the evidence points one way and is susceptible of no reasonable inferences sustaining the position of the non-moving party." *Sunkyong International, Inc. v. Anderson Land & Livestock Co.*, 828 F.2d 1245, 1248 (8th Cir. 1987). In

reviewing the district court's denial of Engelke's JNOV motion, this court must apply the same standard as the district court. *Morgan v. Arkansas Gazette*, 897 F.2d 945, 948 (8th Cir. 1990). This standard requires that the court:

> 1) consider the evidence in the light most favorable to [Scher], who prevailed with the jury; 2) assume that all conflicts in the evidence were resolved by the jury in [Scher's] favor; 3) assume as proved all facts which [Scher's] evidence tends to prove; 4) give [Scher] the benefit of all favorable inferences which may reasonably be drawn from the facts proved; and 5) affirm the denial of the motion if reasonable persons could differ as to the conclusions to be drawn from it.

Id.

In denying Engelke's JNOV motion, the district court relied on *Hudson v. Palmer*, 468 U.S. 517, 104 S.Ct. 3194, 82 L.Ed.2d 393 (1982). In *Hudson*, an inmate brought a § 1983 action alleging that a prison officer

had conducted an unreasonable shakedown search of his cell and had filed a false charge under prison disciplinary procedures against the inmate solely for harrassment purposes. The Supreme Court held that the inmate was not entitled to constitutional protection from unreasonable searches. However, the Court stated:

> Our holding that respondent does not have a reasonable expectation of privacy enabling him to invoke the protections of the Fourth Amendment does not mean that he is without a remedy for calculated harassment unrelated to prison needs. Nor does it mean that prison attendants can ride roughshod over inmates' property rights with impunity. The Eighth Amendment always stands as a protection against "cruel and unusual punishments."

468 U.S. at 530, 104 S.Ct. at 3202.

Additionally, the district court cited *Whitley v. Albers*, 475 U.S. 312, 106 S.Ct. 1078, 89 L.Ed.2d 251 (1986), for the standard used to determine whether the

conduct of prison officials violates the eighth amendment. In *Whitley*, the Court stated:

> It is obduracy and wantonness, not inadvertence or error in good faith, that characterize the conduct prohibited by the Cruel and Unusual Punishments Clause, whether that conduct occurs in connection with establishing conditions of confinement, supplying medical needs, or restoring official control over a tumultuous cellblock.
>
> . . . . .
>
> The general requirement that an Eighth Amendment claimant allege and prove the unnecessary and wanton infliction of pain should also be applied with due regard for differences in the kind of conduct against which an Eighth Amendment objection is lodged.

475 U.S. at 319-20, 106 S.Ct. at 1084.

The district court noted that the jury found that Engelke had in fact searched Scher's cell ten times in nineteen days and left the cell in disarray after three of the

searches, and that these actions constituted cruel and unusual punishment. Applying the *Hudson* and *Whitley* standards, the district court found that there was evidence from which the jury could conclude that an eighth amendment violation had occurred. Thus, the district court concluded that all the evidence did not support Engelke's proposition and denial of the JNOV motion was proper. *Sunkyong, supra.*

[1,2] On appeal, Engelke's primary argument is that pain is a necessary element of an eighth amendment claim and a cell search that involved no abuse, injury or pain cannot constitute cruel and unusual punishment. We cannot agree with Engelke's narrow interpretation of eighth amendment protection. In *Rodgers v. Thomas*, 879 F.2d 380, 384 (8th Cir. 1989), this court stated that "[i]n order to establish an eighth amendment violation after incarceration, a prisoner must establish the unnecessary and wanton

infliction of pain, mental or physical." In *Cowans v. Wyrick*, 862 F.2d 697, 700 (8th Cir. 1988), this court stated that "the jury must have found that plaintiff suffered anguish, misery or pain in order to establish that cruel and unusual punishment was inflicted." In *Martin v. White*, 742 F.2d 469, 474 (8th Cir. 1984), this court recognized that violent attacks or the constant fear of such violence could constitute a violation of the eighth amendment. Additionally, *Whitley, supra*, teaches that the general requirement that the plaintiff allege and prove "the unnecessary and wanton infliction of pain should also be applied with due regard for the differences in the kind of conduct against which an Eighth Amendment objection is lodged." 475 U.S. at 320, 106 S.Ct. at 1084. Thus, the scope of eighth amendment protection is broader than the mere infliction of physical pain at Engelke urges, and evidence of fear, mental anguish, and misery

inflicted through frequent retaliatory cell searches, some of which resulted in the violent dishevelment of Scher's cell, could suffice as the requisite injury for an eighth amendment claim.

The evidence in this case showed that Scher was the victim of Smith's coercive efforts to obtain illicit weapons. Scher acted responsibly in reporting this to prison officials. Smith eventually resigned rather than be removed from his position. Shortly thereafter, Scher, an honor inmate, was subjected to numerous cell searches and an undeserved conduct violation from Engelke. Engelke testified that he had no reason to believe that Scher had contraband in his cell when he conducted the cell searches. Considering these facts in the light most favorable to Scher and giving him the benefit of reasonable inferences, the evidence clearly does not all point to Engelke's position. Instead, it evidence a pattern of calculated

harassment unrelated to prison needs from which the U.S. Supreme Court has stated that prisoners are protected. *Hudson, supra*. Thus, the district court correctly denied Engelke's JNOV motion.

Engelke also argues that previously no other court has found cell searches to violate the eighth amendment. However, the cases on which he relies are easily distinguishable from the present case. None involved the retaliatory aspect so prominent in this case. In *Hudson, supra*, the inmate only alleged one shakedown search. The evidence in the present case discloses ten searches in nineteen days under circumstances which a jury would be justified in finding were motivated by retaliation for Scher's efforts to blow the whistle on a corrupt guard.

In *Vigliotto v. Terry*, 873 F.2d 1201 (8th Cir. 1989), an inmate brought a § 1983 action alleging that prison officials had

violated he eighth amendment rights by conducting several harassing searches, one of which involved the confiscation of legal materials. The district court granted summary judgment to the prison officials. The Ninth Circuit cited *Hudson, supra,* for the proposition that "[t]he Eighth Amendment protects prisoners from searches conducted only for 'calculated harassment.'" *Id.* at 1203. However, the Ninth Circuit affirmed the district court noting that only one search could be substantiated and that a "single incident is insufficient to satisfy *Whitley.*" *Id.* Again, the substantiated conduct in this case is much more egregious than that in *Vigliotto.*

In *Balabin v. Scully,* 606 F.Supp. 176 (S.D. N.Y. 1985), an inmate asserted that cell searches violated the eighth amendment. While the court acknowledged *Hudson, supra,* it dismissed the inmate's claims because he had made no allegations of harass-

ment nor alleged facts establishing an invasion of privacy that rose to the level of cruel and unusual punishment. *Id.* at 1984. In contrast, Scher made strong allegations that he was harassed through the searches and an undeserved conduct violation concerning his roommate's television. Thus, *Balabin* has no application to this case. In sum, these cases do not involve the obdurate and wanton harassment and retaliation in the present case.

B. *Qualified Immunity*

[3] Engelke next argues that he is entitled to qualified immunity. He cites *Harlow v. Fitzgerald*, 457 U.S. 800, 818, 102 S.Ct. 2727, 2738, 73 L.Ed.2d 396 (1982), for the proposition that an official is immune from liability for civil damages when his conduct does not violate clearly established statutory or constitutional rights of which a reasonable person would have known. He asserts that the passage from *Hudson*,

supra, is merely *dicta* and therefore does not clearly establish a constitutional right. We cannot agree.

Contrary to Engelke's assertions, we are not dealing with an esoteric matter of unsettled law of which a guard could not reasonably be expected to know. This is a clear case of a prisoner who was subjected to retaliatory cell searches and conduct violations for bringing the illicit conduct of a prison guard to the attention of prison officials. The law making retaliation for the exercise of a constitutional right actionable under § 1983 has been established for some time and an objectively reasonable official could not fail to know of it. *Freeman v. Blair*, 862 F.2d 1330, 1332 (8th Cir. 1988) (citing *Mount Healthy City Board of Education v. Doyle*, 429 U.S. 274, 283-84, 97 S.Ct. 568, 574, 50 L.Ed.2d 471 (1977); *Buise v. Hudkins*, 584 F.2d 223, 229 (7th Cir. 1978), *cert. denied*, 440 U.S. 916, 99

S.Ct. 1234, 59 L.Ed.2d 466 (1979)). Furthermore, the fact that previously no court has held that cell searches constitute an eighth amendment violation is irrelevant. The U.S. Supreme Court has stated that the action in question need not have been previously held unlawful, "but in the light of pre-existing law the unlawfulness must be apparent." *Anderson v. Creighton*, 483 U.S. 635, 640, 107 S.Ct. 3034, 3039, 97 L.Ed.2d 523 (1987); *Coffman v. Trickey*, 884 F.2d 1057, 1063 (8th Cir. 1989), *cert. denied*, __ U.S. __, 110 S.Ct. 1523, 108 L.Ed.2d 763 (1990). Certainly the unlawfulness of Engelke's retaliatory conduct must have been apparent to him. The basic course of decent human conduct precludes the infliction of such trauma on one in custody.

III. CONCLUSION

Thus we would in any event be strongly inclined to find the evidence of Engelke's

conduct sufficiently egregious to support the jury's verdict, and to hold as a matter of law that he had not established an immunity defense. These conclusions are strongly bolstered by the clarity of the evidence establishing Engleke's retaliatory motivation. Accordingly, we affirm the district court's denial of Engelke's JNOV motion.

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF MISSOURI
EASTERN DIVISION

GREGORY A. SCHER,	)	
	)	
Plaintiff,	)	
	)	
v.	)	No. 86-1100 C (5)
	)	
DICK MOORE, et al.,	)	
	)	
Defendants.	)	

ORDER

Plaintiff initiated this action against several defendants alleging various violations of his constitutional rights while an inmate in the custody of the Missouri Department of Corrections and Human Resources. Plaintiff's allegations against Engelke are basically that Engelke searched plaintiff's cell ten times in nineteen days simply to harass plaintiff, and on three occasions left his cell in substantial disarray. Plaintiff was never touched during the cell searches. Plaintiff also contends that defendant Engelke took his personal

property which consisted of, inter alia, pens and paper.

The Court submitted plaintiff's claim to the jury against defendant Engleke based on the Eighth Amendment guarantee to be free from cruel and unusual punishment. The jury returned a verdict in favor of plaintiff and against defendant Engelke, awarding plaintiff nothing in actual damages, but $1,000 in punitive damages. This matter is before the Court on defendant Daniel Engelke's motion for judgment notwithstanding the verdict, or alternative motion for a new trial.

Judgment notwithstanding the verdict may be properly entered where all the evidence points to movant's position and no reasonable inference sustains the position of the non-moving party. *Sunkyong International v. Anderson Land & Livestock*, 828 F.2d 1245, 1248 (8th Cir. 1987). In deciding a motion for jnov, the court must consider all evidence in the light most favorable to the

prevailing party, assume all conflicts in the evidence were resolved by the jury in favor of the prevailing party, and assume as proved all facts which the prevailing party's evidence tended to prove. *Id.*

Defendant Engelke's first ground for jnov is that the facts do not support a finding of cruel and unusual punishment. The case against Engelke went to the jury solely on Eighth Amendment grounds. This Court instructed the jury that for Engelke's actions to have constituted cruel and unusual punishment, they must have constituted "physical abuse of such base, inhumane and barbaric proportions as to shock the sensibilities." See, Jury Instruction No. 13. The jury found that Engelke had in fact searched plaintiff's cell ten times in nineteen days for no reason other than harassment, and that Engelke had left plaintiff's cell in a state of total disarray after several of those searches, and that

these actions constituted cruel and unusual punishment.

Contrary to the erroneous assertions of defendant, the Eighth Amendment does protect prisoners from searches conducted only for "calculated harassment." *Hudson v. Palmer*, 468 U.S. 517, 530 (1984). In *Whitley v. Albers*, 475 U.S. 312 (1986), the Supreme Court refined the standard for determining whether prison authorities' conduct violates the eighth amendment.

> It is obduracy and wantonness, not inadvertence or error in good faith, that characterize the conduct prohibited by the Cruel and Unusual Punishment Clause, whether that conduct occurs in connection with establishing conditions of confinement, supplying medical needs, or restoring official control over a tumultuous cellblock. . . .
>
> The general requirement that an Eighth Amendment claimant allege and approve the unnecessary and wanton infliction of pain should also be applied with due regard for differences in the kind of conduct against

> which an Eighth Amendment objections is lodged.

Whitley, 475 U.S. at 319-20.

Applying this standard, the Court finds that there is evidence from which the jury could have found that defendant Engelke's conduct constituted cruel and unusual punishment. Defendant contends that no court in the country has held that harassing cell searches constitute cruel and unusual punishment, and cites three cases in support of this proposition. However, this Court finds that each of these cases is clearly distinguishable. For instance, defendant cites the case *Vigliotto v. Terry*, 873 F.2d 1201 (9th Cir. 1989), in which the court granted defendant's motion for summary judgment on eighth amendment grounds. In that case, however, the defendant conducted only one harassing search. Here, defendant Engelke conducted ten searches over a nineteen day period for the sole purpose of harassing

plaintiff. Although one harassing search may be legally insufficient to constitute cruel and unusual punishment, ten may well be sufficient, and the jury has apparently found this to be the case. The Court finds the other two cases cited by defendant for this proposition to be equally unpersuasive. Considering all of the evidence in the light most favorable to plaintiff, the Court finds that all the evidence does not pint to defendant Engelke's position. Thus, the Court will deny defendant's motion on this ground.

Defendant Engelke's second ground for jnov is that he is protected by qualified immunity. A prison official is entitled to immunity from damage, unless his conduct violated a clearly established constitutional right of which a reasonable person would have known. *Harlow v. Fitzgerald*, 457 U.S. 800, 818 (1982). As the Supreme Court has noted that harassing cell searches can constitute cruel and unusual punishment under the

eighth amendment, defendant's argument clearly must fail. When defendant searched plaintiff's cell ten times in nineteen days for no reason other than harassment, which the jury found to be the case, defendant's conduct violated a clearly established constitutional right set forth in *Hudson v. Palmer*, 468 U.S. 517 (1984). Accordingly, the Court will deny defendant's motion on this ground.

Finally, defendant argues that the jury's verdict of no actual damages shows that the jury found plaintiff was not injured. The verdict, however, clearly indicates that the jurors found that defendant Engelke had violated plaintiff's constitutional rights. The jury chose not to place a monetary value on the harm that plaintiff suffered. In such a situation, the injured party is entitled to nominal damages. *Cowans v. Wyrick*, 862 F.2d 697 (8th Cir. 1988). Although this Court manifestly lacks the power to add to the amount of the verdict for either compensa-

tory or punitive damages, when the amount of damages is not disputed and a party is entitled to damages under the verdict as a matter of law, the court may award the undisputed amount. *Taylor v. Green*, 868 F.2d 163, 165 (5th Cir. 1989). Thus, this Court may award nominal damages of $1.00 when the plaintiff has shown that his constitutional rights had been violated, even though he had not proved his right to actual damages. *Taylor*, 868 F.2d at 165. Accordingly, the Court will modify the judgment to provide an award of $1.00 in nominal damages against defendant Engelke.

The Court finds defendant's argument that plaintiff failed to establish his eighth amendment claim because he failed to establish actual damages to be without merit. Clearly, the jury found in favor of plaintiff on his claim for cruel and unusual punishment because it expressly indicated this on the verdict form. Finally, a jury need not find

a plaintiff is entitled to compensatory damages in order to award punitive damages. *See Stolberg v. Members of Bd. of Trustees for State College of Connecticut*, 474 F.2d 485, 489 (2d Cir. 1973).

Although defendant Engelke has raised other arguments in support of his motion for judgment notwithstanding the verdict, the Court finds them to be without merit.

Accordingly,

IT IS HEREBY ORDERED that the judgment entered in favor of plaintiff an against defendant Engelke on October 5, 1989, for compensatory damages is **MODIFIED** to reflect an amount equal to ONE DOLLAR ($1.00).

IT IS FURTHER ORDERED that defendant Engelke's motion for judgment notwithstanding the verdict, or alternative motion for new trial, is **DENIED**.

Dated this 31st day of July 1990.

UNITED STATES DISTRICT JUDGE

Q. Were you ever physically abused --

Were you ever physically injured while you were at the Missouri Correctional Center?

A. No

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* Testimony of Respondent. Trial Transcript, Volume II, p. 142. Scher v. Moore, et al., No. 86-1100-C-5 (E.D. Mo.).